

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANNA REAM,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:17-cv-1141-RAJ

ORDER

I. INTRODUCTION

This matter is before the Court on Plaintiff's motions *in limine*. Dkt. # 25. For the reasons stated above, the Court **DENIES** Plaintiff's motions.

II. BACKGROUND

This matter is set for trial on July 1, 2019. The details of Plaintiff's allegations are set forth in the Order on the parties' motions for summary judgment and will not be repeated here. *See* Dkt. # 24.

III. DISCUSSION

Parties may file motions *in limine* before or during trial "to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984). To decide on the motions *in limine*, the Court is generally guided by Federal Rules of Civil Procedure 401 and 403. Specifically, the Court considers whether evidence "has any tendency to make a fact more or less probable than it would be without the evidence," and whether "the fact is of consequence in determining the action."

1 Fed. R. Civ. P. 401. However, the Court may exclude relevant evidence if “its probative
2 value is substantially outweighed by a danger of one or more of the following: unfair
3 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
4 needlessly presenting cumulative evidence.” Fed. R. Civ. P. 403.

5 The Court notes that the findings and conclusions in this order, like all rulings *in*
6 *limine*, are preliminary and can be revisited at trial based on the facts and evidence as they
7 are actually presented. *See, e.g., Luce v. United States*, 469 U.S. 38, 41 (1984) (explaining
8 that a ruling *in limine* “is subject to change when the case unfolds, particularly if the actual
9 testimony differs from what was contained in the proffer. Indeed even if nothing
10 unexpected happens at trial, the district judge is free, in the exercise of sound judicial
11 discretion, to alter a previous *in limine* ruling.”). Subject to these principles, the Court
12 issues these rulings for the guidance of the parties.¹

13 **A. Plaintiff’s Motion *in Limine* No. 1**

14 Plaintiff moves to exclude evidence that a party other than the United States was at
15 fault for the collision. Dkt. # 25 at 3. Plaintiff’s motion, however, focuses primarily on
16 excluding evidence regarding the cause of Plaintiff’s injuries. Specifically, Plaintiff argues
17 that any evidence that her treating doctor performed an imprudent or improper surgery
18 should be excluded. *Id.* at 3. Plaintiff notes, citing various treatises and Washington case
19 law, that it has uniformly been held that the original tortfeasor is liable for aggravation of
20 the original injury cause by negligent treatment. *Id.* at 3-4. Defendant United States (the
21 government) argues that Plaintiff has the burden of proving that the United States’ actions
22 are the proximate cause of her claimed injuries and that it should not be precluded from
23 presenting evidence on this disputed issue. Dkt. # 28 at 4-5.

24 The Court agrees. The summary judgment order established that the United States

25 ¹ Defendant objects to almost all of Plaintiff’s motions as untimely under Local Rule 16.
26 The Court acknowledges Defendant’s objection but will nonetheless issue preliminary
27 rulings. However, the parties are hereby on notice that the Court will not tolerate further
28 noncompliance with the local rules.

1 breached the requisite duty of care as a matter of law. *See* Dkt. # 24. However, a plaintiff
2 must still prove that the defendant's negligence was the proximate cause of her claimed
3 injuries. *See, e.g., Torno v. Hayek*, 135 P.3d 536 (Wash. App. 2006) (permitting evidence
4 on causation and damages during trial following admitted liability car accident). To the
5 extent Plaintiff seeks to preclude such evidence, the motion is **DENIED**.

6 **B. Plaintiff's Motion in Limine No. 2**

7 Plaintiff moves to exclude Defendant's experts, Wilson C. "Toby" Hayes, Ph.D. and
8 Erik D. Power, P.E., from offering medical inferences on Plaintiff's injuries. Dkt. # 25 at
9 5. Plaintiff cites several Washington state cases for the proposition that the relationship
10 between an accident to resulting physical condition must be established by medical
11 testimony. *Id.* Moreover, Plaintiff argues that opinions regarding what injuries an
12 "average occupant" would sustain are irrelevant. *Id.* Defendant argues that Power
13 performed a collision reconstruction using widely accepted methods based upon the
14 fundamental laws of physics for which he is qualified to opine. Dkt. # 28 at 5-6. As for
15 Hayes, Defendant claims that his extensive background satisfies the *Daubert* standard for
16 testimony regarding medical causation and that, under federal law, the fact that he is not a
17 medical doctor, at best, goes to the weight and not the admissibility of his testimony. *Id.*
18 at 8-9.

19 An expert opinion is reliable under the *Daubert* test for determining admissibility
20 of expert testimony if the knowledge underlying it has a reliable basis in the knowledge
21 and experience of the relevant discipline. Fed. R. Evid. 702. In this case, Power is an
22 Engineering Associate at Hayes+Associates, a Registered Professional Mechanical
23 Engineer, and Fully Accredited Traffic Accident Reconstructionist. Dkt. # 29-1. He has a
24 B.S. in Mechanical Engineering and an M.S. in Mechanical Engineering (with a
25 Biomedical Option), both from Virginia Tech. *Id.* Hayes has more than 50 years of
26 teaching, research and consulting experience in fields ranging across mechanical
27 engineering, experimental mechanics, accident reconstruction, occupant dynamics, injury

1 biomechanics, human functional anatomy, and clinical orthopaedics. Dkt. # 30, ¶ 4.
2 Furthermore, as Vice Chairman for Research in the Department of Orthopaedic Surgery at
3 Beth Israel Deaconess Medical Center, Hayes attended x-ray rounds, often on a daily basis,
4 offering advice to residents and house staff on the mechanisms and treatment of
5 musculoskeletal injuries. Dkt. # 26-5. The injury assessment performed by Power and
6 Hayes consists of a three-step approach that appears in governmental reports involving
7 accident investigations, accident reconstruction, and biomechanics literature. Dkt. # 30 at-
8 The Court finds their general-causation testimony regarding the forces generated in a given
9 collision, and the types of injuries one would expect those forces to cause, to be relevant
10 and admissible.

11 Hayes also seeks to render to offer specific-causation testimony of Plaintiff's
12 injuries. The Ninth Circuit is short on authority discussing whether only medical doctors
13 can make conclusions regarding specific injury causation. Other district courts around the
14 country are split on the issue. *Compare, e.g., Pennsylvania Trust Co. v. Dorel Juvenile*
15 *Group, Inc.*, 851 F. Supp. 2d 831, 838 (E. D. Pa. 2011) (allowing biomechanical engineer
16 to offer expert testimony, in part, because “[a] medical degree is not a prerequisite to
17 qualification as an expert capable of testifying as to the cause of a person’s injuries”),
18 *Phillips v. Raymond Corp.*, 364 F. Supp. 2d 730, 742–43 (N. D. Ill. 2005) (concluding that
19 biomechanical engineer’s qualifications entitled her to testify as to biomechanical causes
20 of the plaintiff’s injuries), and *Yu–Santos v. Ford Motor Co.*, Civ. A. No. 06–1773, 2009
21 WL 1392085, at *13 (E. D. Cal. May 14, 2009) (allowing Hayes to testify as to injury
22 causation, in part because “Defendants cite no legal authority for their proposition that only
23 medical doctors are qualified to provide opinions on injury causation and biomechanics”) *with*
24 *Berner v. Carnival Corp.*, 632 F. Supp. 2d 1208, 1213 (S. D. Fla. 2009)
25 (biomechanical engineer could opine “about the energy involved and whether the energy
26 is sufficient to have caused an injury of the type Berner alleges to have suffered” but could
27 not offer “an opinion that Berner has suffered a brain injury or that his head striking the

1 floor caused an injury”) and *Morgan v. Girgis*, Case No. 07 CIV. 1960 (WCC), 2008 WL
2 2115250, at *5 (S. D. N. Y. May 16, 2008) (collecting cases that have held that “a
3 biomechanical engineer is qualified to offer testimony regarding the forces generated by
4 certain accidents and the likely effects of such forces on the human body, but not to offer
5 an opinion on whether or not the accident at issue could have caused the plaintiff’s
6 injuries”). Despite this split in authority, the Court is satisfied that Hayes has sufficient
7 specific knowledge and experience (including his completion of medical school courses
8 and professorships at Harvard Medical School and Oregon State University) regarding the
9 mechanisms and treatment of musculoskeletal injuries to render an opinion on specific
10 causation. Therefore, Plaintiff’s motion is **DENIED**. Plaintiff is free to challenge Hayes’s
11 opinion on cross-examination.

12 **C. Plaintiff’s Motion in Limine No. 3**

13 Plaintiff moves to exclude the testimony of Dr. Daniel Lazar, a practicing
14 neurosurgeon at Northwest Hospital in Seattle, Washington. Plaintiff’s chief complaint is
15 that Dr. Lazar should not be able to render a medical opinion regarding the cause of injury
16 without having evaluated Plaintiff. Dkt. # 25 at 9. Plaintiff also argues that there is no
17 discernable methodology for Lazar’s opinion. *Id.*

18 The Court disagrees and finds that Dr. Lazar’s opinions are both relevant and
19 reliable given the application of his medical training, education, and experience to the facts
20 of this case. His report indicates that he has received and reviewed Plaintiff’s emergency
21 room records, the records from Plaintiff’s treating physicians and numerous imaging
22 studies and reports, including from her pain physicians. This process is not outside the
23 norm for clinical diagnoses. *See* Federal Judicial Center, Reference Guide on Medical
24 Testimony Reference Manual on Scientific Evidence 670-71 (3d ed. 2011). That Dr.
25 Lazer’s opinions are inconsistent with those of Plaintiff’s physicians is an inadequate basis
26 for this Court to conclude that his methodology is unreliable for purposes of admissibility.
27 *See* Fed. R. Evid. 702, 703. The Court is satisfied that Plaintiff’s contentions go to the

weight, not the admissibility of Dr. Lazer's conclusions. Therefore, the motion is **DENIED**.

D. Plaintiff's Motion in Limine No. 4

Plaintiff similarly moves to exclude the testimony of Dr. Virtaj Singh. Dr. Singh is a physiatrist and medical doctor at Seattle Spine and Sports Medicine in Seattle, Washington. Dkt. # 32. He is also Board Certified in Pain Medicine, which requires demonstrated expertise in all areas of Pain Medicine, including psychiatry and psychology. *Id.* Dr. Singh opines that there is no anatomical reason for Plaintiff's physical pain and attributes her discomfort to psychological disorders. *Id.*, ¶12.

Plaintiff contends that Singh is not qualified to render psychological diagnoses and that his report fails to cite to literature, testability, error rate, or evidence for his conclusions. Dkt. # 25 at 11. Singh's report notes that his opinion is based on comprehensive review of Plaintiff's medical records, including MRI imaging studies, physical therapy records, psychological evaluations, operative notes, and pain management notes. *Id.*, ¶10. Singh also completed an interview with Plaintiff to obtain her family history, social history, and subjective report of her medical history and condition and then physically examined her on May 18, 2018. *Id.* As the Court noted with respect to Dr. Lazer, this process is not outside the norm for clinical diagnoses. Plaintiff's criticisms, including the fact that Singh previously opined that Plaintiff needed revision surgery to alleviate back pain, goes to the weight of his testimony rather than admissibility. Accordingly, Plaintiff's motion is **DENIED**.

E. Plaintiff's Motion in Limine No. 5

Plaintiff moves to exclude Defendant's expert Bill Partin. Plaintiff claims that Partin will depart from economic calculations in his testimony and will instead delve into medical and vocational matters for which he is unqualified to render an expert opinion. Dkt. # 25 at 12. Plaintiff's argument is wholly speculative and is unsupported by citations to Partin's report or proffered testimony. The Court declines to make the *in limine* ruling in a vacuum and **DENIES** the motion without prejudice.

F. Plaintiff's Motion *in Limine* No. 6

Plaintiff moves to exclude all records reflecting Plaintiff's collateral source income, including social security benefits and workers' compensation. Dkt. # 25 at 13. Plaintiff cites a Washington case in support, *Stone v. City of Seattle*, 391 P.2d 179 (Wash. 1964), which establishes that collateral source payments, which have a tendency to mitigate the consequences of the injury that a plaintiff may otherwise would have suffered, may not be taken into consideration when assessing the damages the defendant must pay. *Id.* at 172. This rule does not, as Plaintiff contends it does, require exclusion of social security and workers' compensation records "regardless of what it is being used to show." Dkt. # 25 at 11. To the extent Plaintiff relies on this case law as a basis for excluding such evidence, the motion is **DENIED**. The Court declines to make the *in limine* ruling in a vacuum.

G. Plaintiff's Motion *in Limine* No. 7

Plaintiff seeks to bar of any evidence or opinions not disclosed in pre-trial reports or discovery. Dkt. # 25 at 12. However, the federal rules permit use of such information at trial if the party's failure to disclose the required information is substantially justified or harmless. Fed. R. Civ. P. 37(c)(1). As Plaintiff fails to specify particular evidence at issue, the Court declines to make the *in limine* ruling in a vacuum. Plaintiff's motion is **DENIED** without prejudice.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiff's motions *in limine*.
Dkt. # 25.

DATED this 24th day of June, 2019.

Richard A. Jones

The Honorable Richard A. Jones
United States District Judge